

# Models for the Analysis of Legal Argumentation

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## ***Introduction***

In their classical works on argumentation the philosophers Chaim Perelman and Stephen Toulmin presented the procedures and practices of legal reasoning as a model for a rational practice of argumentation. In the 50 years since the publication of Perelman and Olbrechts-Tyteca's *La nouvelle rhétorique, Traité de l'argumentation* (1958) and Toulmin's *The uses of argument* (1958) argumentation theorists and informal logicians have developed models for the analysis and evaluation of argumentation in the practical sphere, among them models for legal argumentation. Since argumentation theory and informal logic have become disciplines that have developed their own models of rational argumentation, it seems a good moment to have a closer look at how these models can be applied to legal argumentation and how they can be used to show the strengths and weaknesses of the practices of legal argumentation.

The aim of this special issue is to give an overview of recent developments in research of legal argumentation and legal decision-making where models for the analysis and evaluation of legal argumentation have been developed. In different disciplines such as argumentation theory, informal logic, legal theory and rhetoric, different models have been developed for reconstructing patterns of legal reasoning that underlie the process of legal decision-making, with the aim of evaluating the quality of judicial decisions. They address questions regarding both the quality of the decision-making process in factual matters as well as the quality of decision-making and justification in the interpretation and application of legal rules. The contributions to this special issue are written by authors from such different scientific backgrounds as argumentation theory, formal and informal logic, rhetoric and legal theory. They represent different traditions of legal decision-making: common law traditions and continental law traditions. The various contributions address topics that are central in recent discussions

about the quality of legal justification: the defeasibility of legal reasoning, criteria and use of abduction in legal reasoning, the ontological status and the standards for a correct use of forms of legal reasoning such as *a contrario*, analogy, etc., norms for weighing and balancing as a specific form of legal reasoning, the role of topics in legal reasoning and legal argumentation.

The first four contributions are concerned with models for the analysis and evaluation that are based on a dialectical conception of argumentation. The common aspect of the contributions is that they conceive legal argumentation as part of a (critical) discussion in which a legal standpoint is defended against certain forms of critique in light of certain common starting points. The authors develop their models by integrating insights from legal theory, argumentation theory and pragmatics. The approaches have different theoretical backgrounds (Godden and Walton are informal logicians, Feteris and Jansen are argumentation theorists, Canale and Tuzet are analytical philosophers and lawyers), but they share the idea that a dialectical approach offers the best perspective to give an adequate analysis and evaluation of the justification of judicial decisions. The last two contributions represent the logical and the rhetorical approach to legal argumentation, the two traditional approaches in the study of legal argumentation and legal method. John Woods is a logician who uses logic as a model for the analysis and evaluation of the process of legal decision-making in common law criminal proceedings. He gives an analysis of the abductive reasoning used in the evaluation of evidence and assesses the quality of this way of reasoning. Günther Kreuzbauer is a rhetorician and lawyer and uses rhetoric as a model for the analysis of the process of legal decision-making. He discusses the way in which lawyers in the continental law system construct arguments from the perspective of the theory of *topoi*.

The first two contributions are concerned with a dialectical analysis of the reasoning underlying a decision that takes into account two different views of the application of the law in a concrete case. Godden and Walton concentrate on the analysis of adversary legal argument in an appeal case. Feteris concentrates on the analysis of the weighing and balancing underlying the decision by a judge who must choose between the two incompatible views of the parties about the application of the law in a concrete case.

In their contribution, 'Defeasibility in judicial opinion: logical or procedural,' David Godden and Douglas Walton develop a dialogical model for the analysis of defeasible reasoning in appellate decisions. The authors start from the idea that a characteristic of legal reasoning is that it is in some sense defeasible. However there are different views as to the question how the defeasibility must be analysed. Following Prakken, Godden and Walton opt for a procedural approach and characterize reasoning in adversary legal argument as a form of discussion between

participants who may assume different dialectical roles and therefore potentially shifting burdens of proof. For this reason, legal reasoning should be analysed from a procedural dialectical perspective and not from a logical perspective. Godden and Walton analyse the defeasibility in a trial in the context of an appeal case in which the decision is defeated because the decision relies on an inference that is somehow faulty or inapplicable to the actual case. In their view the meta-dialogues which examine the correctness of the reasoning and argumentation that occurred in the trial-level dialogue can be best explained from a procedural dialectical perspective.

In her contribution, 'Weighing and balancing in the justification of judicial decisions,' Eveline Feteris develops a pragma-dialectical model for the analysis of weighing and balancing in the justification of judicial decisions that are based on teleological-evaluative argumentation. In her view, teleological-evaluative argumentation in which a judge justifies his decision by referring to the consequences of application of a legal rule in a concrete case by referring to the goals and values the rule is intended to realize involves a specific form of weighing and balancing. The judge (implicitly) weighs two applications of a legal rule in a concrete case that are put forward by the parties in dispute: one in a literal interpretation and one in a teleological-evaluative interpretation. On the basis of insights taken from legal theory and legal philosophy she first gives a reconstruction of the burden of proof of a judge who uses such a complex argumentation. Then she translates this burden of proof in terms of a pragma-dialectical model for the analysis and evaluation of justifications based on a weighing and balancing in which teleological-evaluative considerations form the basis of the justification.

The following two contributions that start from a dialectical conception develop models for the analysis of the *a contrario* argument, the argument that claims that from the fact that a legal rule, in its literal form, does not cover the particular facts the conclusion can be drawn that it is not applicable to this case. Both Canale and Tuzet and Jansen start from the assumption that there are different forms of *a contrario* reasoning and that for the different forms different criteria of soundness apply.

In their contribution, 'On the contrary: Inferential analysis and ontological assumptions of the *a contrario* argument,' Damiano Canale and Giovanni Tuzet develop a model for the analysis of *a contrario* arguments used in the justification of legal interpretations. They make a distinction between two forms of *a contrario* reasoning, examples of which can be given on the basis of the normative sentence 'Underprivileged citizens are permitted to apply for State benefit'. According to the strong version, only underprivileged citizens are permitted to apply for state benefit, so stateless persons are not. According to the weak, the law does not regulate the position of underprivileged stateless persons in this respect. By giving a pragmatic-inferential analysis of the two uses of the *argument a contrario* along the

lines of the scorekeeping practice as described by Robert Brandom, they characterize the use of the two forms in terms of the normative statuses assumed by the speakers in the context of an exchange of reasons. On the basis of this analysis they claim that in order to determine whether one of the two uses of the *a contrario* argument is correct in a given context it is necessary to establish what the underlying incompatibility relation in the concrete case is.

In her contribution, 'In view of an express regulation: Considering the scope and soundness of *a contrario* reasoning,' Henrike Jansen develops a model for the analysis of linguistic *a contrario* argumentation as conceived in the traditional concept of this form of argumentation, which presents the traditional concept of this form of argumentation in which an appeal is made to the silence of the legislator with the conclusion that the rule is not applicable to the concrete case. She contrasts this traditional concept with a modern concept in which *a contrario* reasoning is also a form of argumentation where the applicability of a rule to a case is denied because of the differences between the case at hand and the case mentioned in the legal rule. In her view, confusion about the soundness of *a contrario* reasoning can be traced back to the confusion of the two concepts. Using a pragma-dialectical view of argumentation, Jansen develops a model for the analysis and evaluation of the traditional form of linguistic *a contrario* that she conceives as the 'real' *a contrario*. She describes under what circumstances this form can be considered acceptable, that is when the implicit underlying assumption about the intention of the legislator is made explicit and justified according to legal standards of acceptability.

The last two contributions discuss the application of a logical and a rhetorical model to legal reasoning and legal argumentation. In his contribution Woods, who represents the logical approach, shows how a logical-abductive model of the analysis of legal reasoning can be used in clarifying the weak spots in the decision of a jury in a criminal case. Kreuzbauer, who represents the rhetorical approach, discusses the contribution of classical and modern applications of the model of topics in legal reasoning.

In his contribution, 'Beyond reasonable doubt: An abductive dilemma in criminal law, John Woods explains how a logical analysis of the abductive dilemma underlying the decision of a jury may clarify the problems inherent to reasoning in criminal law in common law systems where the accused may be convicted on the basis of wholly circumstantial evidence even in the face of a reasonable case for acquittal. Woods characterizes the problem the jury in a criminal case is faced with when it must give a decision about the merits of the parties' theories of the case as an abductive dilemma. According to Woods the proof standard in criminal proceedings that the accused must be proven guilty 'beyond reasonable doubt' is subject to constraints that appear to damage the epistemic legitimacy of criminal proceedings because it

would generate verdicts that are either factually untrue or factually unsupported. Woods gives an analysis of the abductive dilemma by clarifying the two problems that form the basis of the dilemma, the no-reason-to-doubt problem and the no-rival problem.

In his view, in assessing the quality of factual decisions taken in criminal proceedings such an abductive model of logical analysis may help in clarifying the underlying epistemic assumptions of decisions that are based on a criminal proof standard that is subject to critique.

In his contribution, 'Topics in contemporary legal argumentation: Some remarks on the topical nature of legal argumentation in the continental law tradition,' Günther Kreuzbauer discusses the topical model of argumentation as it has been developed in classical and modern approaches and he addresses the relevance of topics for modern legal argumentation. He begins with a discussion of the development of the topical theory, starting with the *Topics* of Aristotle and Cicero, then discusses the contribution by Vico, and lastly, the application to law by Viehweg. Then he explains the functions of *topoi* that are relevant for legal argumentation: the constructive function as a heuristic tool for the construction of arguments and the material function as standardized arguments in a dialectical context. On the basis of these functions he describes the use of *topoi* in the different rhetorical stages in the construction of an argument. Finally he discusses the role of topics in legal argumentation in the continental European tradition. Kreuzbauer explains that the argumentation used in this context is topical only in a very weak sense. Specific legal *topoi*, as listed by Gerhard Struck in 1971, play only a minor role, and therefore Viehweg's view, that legal argumentation is essentially topical cannot be generally supported.

The various contributions to this special issue show that the models developed in argumentation theory, informal logic, formal logic and rhetoric can be applied to legal argumentation and that they form a good instrument to show the strengths and weaknesses of the practices of legal argumentation. All the contributions start from the assumption that the decision by a judge or jury is taken on the basis of the merits of the arguments from both sides and that a model of argumentation must be capable of clarifying the underlying assumptions and choices made in the decision process so that they can be submitted to critique. The different contributions show how specific insights from the various disciplines, often by way of integration with insights from legal theory, can highlight the characteristics of a specific aspect of the reasoning such as the defeasibility, the weighing and balancing, drawing a conclusion on the basis of the silence of the legislator, deciding on the basis of abduction, and the use of topics. The different contributions taken together offer a good overview of the 'state of the art' in the development of dialectical, logical and rhetorical models and how they may be applied to the analysis and evaluation of legal reasoning.